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In the Supreme Court of the United States

OCTOBER TERM, 1979

TINO FIUMARA, MICHAEL COPOLLA, JERRY COPOLLA AND LARRY RICCI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in imposing sentence, the district court properly considered hearsay evidence of petitioners' involvement in organized crime and properly declined to make factual findings regarding certain evidence presented at the sentencing hearing.

2. Whether the district court properly permitted the jury to use transcripts of tape recordings during their deliberations.

3. Whether a transcript of a government witness's grand jury testimony should have been admitted into evidence.

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OPINION BELOW

The judgment of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1980. A petition for rehearing (Pet. App. B) was denied on April 23, 1980, and the petition for a writ of certiorari was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of extortion (Count 1) and conspiracy to commit extortion (Count II), in violation of 18 U.S.C. 1951 and 2. Petitioner Fiumara was sentenced to 20 years' imprisonment and a $10,000 fine on each count, petitioner Michael Copolla to 10 years' imprisonment and a $5,000 fine on each count, petitioner Jerry Copolla to seven years' imprisonment and a $5,000 fine on each count, and petitioner Ricci to three years' imprisonment and a $5,000 fine on each count. All prison sentences are to run concurrently. The court of appeals affirmed by judgment order (Pet. App. A).

1. The evidence showed that on May 25, 1977, petitioner Fiumara told Louis Crescenzi, a New Jersey restaurant owner, that at his request they had successfully resolved a dispute that he had with persons, including Michael Simonini, an ex-employee, who were trying to collect $4,600 allegedly owed by Crescenzi to Simonini (Tr. 1708, 1712-1715). Concerned about possible harm to himself or to his business if he did not pay for this assistance, Crescenzi asked petitioner Fiumara what he could do to repay them. Fiumara directed Crescenzi to

follow petitioner Jerry Copolla's instructions (Tr. 840-841, 1721-1722, 1726-1728).

On June 2, Jerry Copolla demanded that Crescenzi turn over 25% of the restaurant's income and told Crescenzi not to tell anyone about it, or else Copolla would have to "run you over" (Tr. 1729-1733, 1744). Two weeks later Jerry Copolla instructed Crescenzi to put him (Copolla) on the restaurant's payroll at a salary of $300 per week (Tr. 756-761, 1844). Crescenzi thereafter paid Jerry Copolla in cash every week in July, August and September and in the first week of October (Tr. 1347-1348, 1789-1793).

On October 7, 1977, while still paying petitioners on their demand (Tr. 2196), Crescenzi testified before the grand jury. He described how he had sought petitioners' assistance to settle the claim and how he subsequently had paid them part of his profits out of fear that petitioners would harm him if he refused to cooperate.

In his trial testimony, Crescenzi changed the story he had given the grand jury in October 1977 and testified that he was never threatened by petitioners, but rather paid them voluntarily. On occasions where Crescenzi's trial testimony differed from his October grand jury testimony, the government utilized the grand jury testimony to question Crescenzi about the inconsistencies (see, *e.g.*, Tr. 1721-1722, 1735-1737).

At the conclusion of the direct examination, the government offered the October 7 testimony into evidence, contending that, as a statement under oath inconsistent with his trial testimony, it was not hearsay under Fed. R. Evid. 801(d)(1)(A) and was therefore admissible. The district court reserved its ruling until after cross examination (Tr. 1902-1903).

Crescenzi then related on cross examination that on June 1 and June 29, 1978, he had appeared before the grand jury and had attempted to "correct" his earlier testimony by giving essentially the same testimony as he later gave at trial. In an attempt to explain why he had earlier testified differently, Crescenzi said that he was not given a chance to explain his answers and that the prosecutor's questioning during his October testimony was deceiving and suggestive (see, *e.g.*, Tr. 1965-1966, 1989, 1991-1992, 2063-2065).

After recross examination, the court accepted the government's additional argument that the October grand jury transcript was admissible as evidence to rebut the assertion that Crescenzi had been tricked and misled before the grand jury (see Tr. 2027-2028, 2227-2230). The court also determined that a transcript of the October grand jury appearance should be given to the jury instead of merely having particular questions read to them, because the court found that the jury could decide if Crescenzi had been unfairly interrupted by the prosecutor during his grand jury testimony only by examining the transcript itself (Tr. 2659-2660).

2. The court also permitted the government to introduce tape recordings of conversations between Crescenzi and an informant, Patrick Kelly, as additional evidence to show that Crescenzi paid petitioners because of fear. The jury was given a transcript of the tape recordings. Before permitting the jury to listen to the tapes, the court admonished the jury how it could use transcripts of the tape recordings that had been prepared (Tr. 379-380):

> [Transcript G-1A] is actually only what somebody else heard, who put on these earphones as you will very shortly. That person listened through the

> earphones and wrote down what they heard through their ears. And prepared this transcript. I am giving it to you only as an aid to you. It is not the primary evidence of what was actually said. The primary evidence of what was actually said during the conversation will be what is on the tape, itself. * * * If at any time in listening to the tapes, you through your earphones, hear something different than is written on the paper, then I instruct you to disregard what is on the paper and follow what you, yourself hear * * * with your own ears * * *.

Before and after summation, petitioners objected to sending transcripts of the tape recordings into the jury room without the accompanying tapes. The court nonetheless decided to send the transcripts in as an aid to the jury in their determination whether any of the tape recorded conversations corroborated the conflicting trial testimony of Crescenzi and the informant (Tr. 2916, 2945-2946). In its final instructions, the court charged the jury on the use of the transcripts as follows (Tr. 2946-2947):

> I want you to remember the instruction I gave you at the time you first heard those recordings and first read from the transcripts. The primary evidence of what the recordings actually are are the recordings themselves. * * *
>
> * * * * *
>
> If the jury wishes I will, of course, have played for you any tape recording which is in evidence which you wish to hear. So, in other words, you may use the transcripts as an aid to you in deliberating, and if you require it, or wish it, I will have replayed for you any of the conversations. I cannot send the tape recordings, themselves, into the jury room for the excellent reason that I doubt many of you know how

> to work all the equipment that would be required and, second of all, as you know, there are some irrelevant conversations which have to be deleted and they remain on the tape and couldn't be deleted by you in the jury room.

3. Prior to sentencing, by a letter dated July 10, 1979 (Pet. App. C), the government advised the Probation Office of evidence of other criminal conduct on the part of petitioners and requested that the Probation Office incorporate the evidence in its presentence reports. The government asserted, *inter alia*, that petitioners were members of organized crime and had no legitimate means of support and that petitioner Fiumara had committed two murders for which he was neither tried nor indicted. Petitioners challenged the accuracy of the charges and were granted an evidentiary hearing.

At the hearing, petitioners (with the exception of petitioner Ricci) called no witnesses and presented no affirmative evidence to disprove the government's allegations. The court, when it subsequently imposed sentence, made no specific findings as to whether the government had proven every allegation of additional criminal conduct. Instead, the court stated (App. 4834a-4838a):[1]

> Everything the Court learned about these defendants [at trial], with perhaps one exception, was confirmed by the sentencing hearing. Not one piece of mitigating circumstances was presented. * * * Everything this Court heard served only to confirm its assessment made at the trial itself, that

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[1] "App." refers to the transcript of the sentencing hearing, as paginated in petitioners' joint appendix filed in the court of appeals.

the defendants before it were engaged in organized criminal activity. * * *

I say again the issue before me is not whether a defendant committed this or that specific wrong in the past. He is not being punished for a specific wrong in the past, he is being punished for the crime this jury found him guilty of. But the Court has the duty, the obligation, unavoidable, in considering the background and the potentiality of each defendant and in that regard held a hearing * * *.

* * * * *

This court finds now, and finds as a result of the trial, and has heard nothing to change its opinion, that the defendant Fiumara, the defendant Michael Copolla, and the defendant Jerry Copolla, traded on and used the defendant Fiumara's reputation in the community for violence, for fear, for wrongdoing in general, as a tool or a weapon against Louis Crescenzi.[2]

Petitioners at no time made any request to the district court that it make specific findings with reference to the sentencing hearing.

ARGUMENT

1. Petitioners argue (Pet. 8-16) that the district court deprived them of due process in connection with their sentencing by considering evidence of criminal charges not embodied in an official record of conviction and by failing to make specific findings of fact as to the

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[2]The court did note that the sentencing hearing had altered its view of petitioner Ricci and that this would have an impact on the sentencing decision (App. 4838a). As noted above, Ricci received a sentence of only three years' imprisonment.

government's charges of additional criminal conduct presented at the sentencing hearing. Both contentions are without merit.

It is well settled that the Due Process Clause does not prohibit the use of hearsay evidence at a sentencing proceeding or require that the convicted defendant be allowed to cross examine the source of such information. "[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause * * * consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). See also *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *Roberts* v. *United States*, No. 78-1793 (April 15, 1980). Thus, "before making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, *supra*, 404 U.S. at 446, quoted in *United States* v. *Grayson*, *supra*, 438 U.S. at 50.

The factors that the sentencing court may consider include information that the defendant has committed unrelated crimes for which he has not been convicted. See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244 (consideration of information that defendant had committed 30 burglaries for which he had not been convicted and that he was a "menace to society"). Petitioners contend (Pet. 11 n.4) that the Court's holding in *Williams*

v. *New York, supra,* has been limited by later decisions. However, the Court's opinion in *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967), and the plurality opinion in *Gardner* v. *Florida*, 430 U.S. 349, 355-357 (1977), relied upon by petitioner for this proposition, expressly adhere to the holding in *Williams*, and the plurality opinion in *Lockett* v. *Ohio*, 438 U.S. 586, 602-603 (1978), cites *Williams* with approval. Indeed, this aspect of *Williams* was reaffirmed by the Court in *United States* v. *Grayson*, *supra*, 438 U.S. at 53-54. See also *Roberts* v. *United States*, *supra*, slip op. 4.[3]

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[3]Petitioners rely in their due process argument (Pet. 8-9) on *Baker* v. *United States*, 388 F. 2d 931, 934 (4th Cir. 1968), where the court stated that "[n]o conviction or criminal charge should be included in the [presentence] report, or considered by the court, unless referable to an official record." Petitioner's reliance on this statement in *Baker* is misplaced for a variety of reasons. First, the court was only referring to convictions or formal criminal charges, not all statements regarding past conduct that may be criminal. See 388 F. 2d at 932 (quoting district court's reference to "serious charges" against defendant that were withdrawn because his father had interceded on his behalf); see also *id.* at 933. Compare *United States* v. *Sheppard*, 462 F. 2d 279, 280 (D.C. Cir. 1972), cited in *United States* v. *Strother*, 578 F. 2d 397, 406 n.8 (D.C. Cir. 1978), discussed *infra*. Thus, immediately after the statement quoted by petitioners, the court stated that "the defendant's general conduct and behavior" may be treated in the report, and the court did not indicate that references to conduct or behavior must be omitted where it may be criminal. Second, the Fourth Circuit did not suggest, as petitioners do here, that the requirement that criminal charges be referable to a public record was compelled as a matter of due process. Third, any intimations that evidence of other criminal activity could not be considered unless evidenced by a conviction or formal charge would be inconsistent with *Williams* v. *New York*, *supra*, as reaffirmed (subsequent to the decision in *Baker*) in *United States* v. *Grayson*, *supra*. Finally, the Fourth Circuit's decision in *Baker* preceded enactment in 1970 of 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of the defendant that may be considered for purposes of sentencing. See also *United States* v.

Furthermore, petitioners' claim that due process requires the sentencing judge to make detailed findings of fact as to each incident mentioned in the report, which findings can then be appealed, is insubstantial. It is undisputed, of course, that due process prohibits sentencing courts from considering materially false information. See, *e.g.*, *United States* v. *Tucker*, *supra*, 404 U.S. at 443; *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948). In addition, some courts of appeals have instructed sentencing courts to require verification of challenged evidence through cross examination and corroboration. See *United States* v. *Weston*, 448 F. 2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *United States* v. *Bass*, 535 F. 2d 110, 118 (D.C. Cir. 1976); *United States* v. *Needles*, 472 F. 2d 652 (2d Cir. 1973). Yet the Due Process Clause is not "treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." *Williams* v. *New York*, *supra*, 337 U.S. at 251. Accordingly, as the district

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Tucker, *supra*; *United States* v. *Lee*, 540 F. 2d 1205, 1210-1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).

The Ninth Circuit's decision in *United States* v. *Weston*, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), upon which petitioners also rely, expressly declined to follow what the court apparently believed to be the holding in *Baker* that no other criminal activity could be considered (*id.* at 633 n.1). In *United States* v. *Strother*, *supra*, also relied upon by petitioners, the court did not hold that information about criminal activity could not be included in a presentence report. It stated only that a provision in the ABA Standards for Criminal Justice Relating to Probation, which suggests that a description of the offender's prior criminal record be limited to charges that have resulted in conviction, "merits careful consideration by the Probation Office and the U.S. Attorney" (578 F. 2d at 406 n.8).

court noted (App. 4826a), the purpose of a sentencing hearing is "* * * to give fair hearing to both sides and not to convert such a hearing into a post-trial trial in which the judge was obligated to make findings of fact under any standard of proof certain."[4]

In this case, the sentencing judge afforded petitioners the opportunity, in a hearing filling more than 1,600 pages of transcript, to contest allegations in the presentence report. Indeed, in response to petitioners' challenge, the government withdrew certain of its contentions (see App. 4828a). The court declined to make a determination as to whether the criminal activity mentioned in the presentence report was in fact committed (see App. 4829a-4831a), and petitioners never requested the court to make such findings.[5] Instead, the court utilitized evidence presented at the hearing as information to be considered in determining whether petitioners were dangerous to the community and whether their usual employment was criminal or legitimate. As to these matters, the court did make findings (App. 4832a-4833a, 4837a-4838a; see pages 5-6, *supra*). Moreover, in finding that petitioners were members of organized criminal groups and that petitioners Michael Copolla, Jerry Copolla, and Fiumara

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[4]The district court in *United States* v. *Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), required the government to prove its charges that the defendant was a member of an organized crime "family" by "clear, unequivocal and convincing evidence." The Second Circuit, however, did not reach the question of the proper standard of proof, except to hold that proof beyond a reasonable doubt was not necessary. *United States* v. *Fatico*, 603 F. 2d 1053, 1057 n.9 (2d Cir.), cert. denied, 440 U.S. 910 (1979). No conflict with the Second Circuit's decision is therefore presented.

[5]Indeed, petitioner Fiumara requested that the court refrain from disclosing in open court the basis for the sentence imposed to the extent it was predicated upon allegations of criminal activity not established by record of conviction (App. 4989a-4993a).

had no legitimate means of support, the court based its conclusion principally on the evidence presented during the trial. The district court utilized the government's presentations at the sentencing hearing as confirmation of what it learned at trial (see App. 4823a-4835a, 4837a-4838a).[6] In view of the court's finding that the sentencing hearing merely reinforced impressions gleaned from the trial (and developed no mitigating considerations (App. 4834a-4835a)) and that the court did not rely upon the veracity of the government's charges of other crimes, review by this Court is unwarranted.[7]

2. Petitioners next argue (Pet. 16-18) that the court committed reversible error when it permitted the jury to take transcripts of tape recorded evidence into the jury room without the accompanying tape recordings. Petitioners do not point to any inaccuracy in the transcripts that would suggest they were an unreliable aid in the jury's deliberations. In any event, under the

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[6]The court did find that its prehearing assumption that petitioner Ricci had no legitimate means of support was altered by evidence presented at the sentencing hearing (App. 4838a).

[7]Petitioners' reliance on *Specht* v. *Patterson*, 386 U.S. 605 (1967), and the Dangerous Special Offenders Act, 18 U.S.C. 3575, *et seq.*, is misplaced. In *Specht*, the defendant was convicted of the crime of indecent liberties, which served as the predicate for a separate commitment proceeding and sentence under the Sex Offenders Act. The Court expressly adhered to its decision in *Williams*, but declined to extend the *Williams* rule to a case where "[t]he Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act." 386 U.S. at 608. Similarly, the Dangerous Special Offenders statute makes past convictions the basis for enhanced sentencing under the Act. Since the present case involved sentencing only within statutory limits for the crimes for which petitioners were convicted at trial, *Specht* and the procedures employed in the Dangerous Special Offenders Act are of no relevance.

circumstances of this case, the district court did not err in allowing the jury to have the transcripts.

Admission of sound recordings and transcripts thereof is entirely within the discretion of the trial judge. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 148, 167 (9th Cir.), cert. denied, 423 U.S. 996 (1975). Although, as petitioners assert, submission of a transcript alone to the jury during deliberations is usually discouraged because the tape recording itself is the best evidence of the prior conversation,[8] courts have permitted juries to have transcripts during deliberations where the jury has already heard the tape, the tape is long and cumbersome, and the jury was given limiting instructions on the proper use of the transcripts. See *United States* v. *Lam Lek Chong*, 544 F. 2d 58, 71 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Koska*, 443 F. 2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

In the instant case, the trial court instructed the jury that the tapes were the primary evidence of what was said, that the transcripts were only to be used as an aid in deliberating, and that the jury could have replayed any tape they wished to hear (see page 4, *supra*).[9] The court found that it was not feasible to send the tapes in with the jury because the tapes were not edited of prejudicial material and that the transcripts themselves, which had been personally reviewed by the court and were extensively relied upon by both government and defense counsel, were extremely accurate (Tr. 2917-2919).[10] In

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[8]See, *e.g.*, *United States* v. *McMillan*, 508 F. 2d 101, 105-106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *Rotchford*, 575 F. 2d 166, 172 (8th Cir. 1978).

[9]The court did in fact comply with a jury request that the court replay one tape during the course of deliberations (Tr. 2976-3000).

[10]The court also found that the machinery to play the tapes would have been cumbersome for the jury to operate.

these circumstances, the court did not abuse its discretion in permitting the jury to retain copies of the transcripts.

3. Petitioners finally contend (Pet. 18-21) that the court erred in refusing to permit the jury to have transcripts of Crescenzi's testimony before the grand jury on June 1 and June 29, 1978. Petitioners concede (Pet. 19-20 n.9) that virtually every pertinent statement made by Crescenzi during his June appearances before the grand jury was read into the record by counsel in the course of the trial. But they argue that the district court also should have permitted the jury to receive actual transcripts of the June appearances because the court had permitted the jury to receive copies of the transcript of Crescenzi's October grand jury appearance. Petitioners' argument is without merit.

At trial, Crescenzi testified that petitioners had not put him in fear of harm to himself, members of his family, or his business and that he had paid petitioners voluntarily (Pet. 4; see, *e.g.*, Tr. 1735, 2008). The court then permitted the prosecutor to read portions of the transcript of Crescenzi's appearance before the grand jury in October 1977, during which he testified that he was placed in fear by petitioners (see, *e.g.*, Tr. 1721-1722, 1735-1737). This ruling, which petitioners do not challenge, was plainly correct. The grand jury testimony constituted prior inconsistent sworn statements of the witness and therefore, by virtue of Fed. R. Evid. 801(d)(1)(A), was not hearsay. But the district court did not admit the entire transcript into evidence and permit the jury to examine it on this basis. The district court admitted the transcript because petitioners sought to establish that Crescenzi's examination before the grand jury in October had been unfair due to overreaching, improper questioning, and manipulation by the government. Only by reading the entire transcript, the court reasoned, could the jury

determine whether in fact there had been misconduct on the part of the government that caused Crescenzi to testify in a manner inconsistent with his subsequent trial testimony (Tr. 2659-2660).

The district court correctly determined (Tr. 2060-2662) that Crescenzi's testimony before the grand jury in June, at issue here, was inadmissible hearsay because it was consistent with his trial testimony that he had not been in fear of petitioners and that his contrary testimony before the grand jury in October was the product of overreaching by the government.[11] However, petitioners argued in district court (Tr. 2657), and argue in this Court (Pet. 18-21), that Crescenzi's testimony was admissible under Fed. R. Evid. 106.[12]

When a writing or recorded statement is introduced into evidence by a party, Rule 106 allows an adverse party to require that the remainder of the writing or statement or related writings or statements be introduced into evidence if such matter ought in fairness be considered

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[11]Petitioners assert that the June testimony, even though consistent with Crescenzi's trial testimony, was admissible under Fed. R. Evid. 801(d)(1)(B) to rebut charges of recent fabrication. Petitioners did not rely on Fed. R. Evid. 801(d)(1)(B) in arguing the admissibility of the transcript in district court (Tr. 2655-2666). In any event, the prior consistent statement must predate the inception of the motive to fabricate to be admissible under Rule 801(d)(1)(B). *United States* v. *Quinto*, 582 F. 2d 224, 232-235 (2d Cir. 1978). Here, the motivation for Crescenzi to fabricate his testimony at trial—*i.e.*, fear of petitioners—was the same as would have obtained at the time of his grand jury appearance in June 1978, and therefore his testimony on that occasion did not predate the motive to fabricate.

[12]Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

contemporaneously with it. The rule is designed to avoid misleading impressions caused by taking matters out of context. See Advisory Committee Notes to Rule 106; *United States* v. *Jamar*, 561 F. 2d 1103 (4th Cir. 1977). There can be no contention in the present case that Crescenzi's October grand jury testimony might have been considered out of context, because the entire testimony was available to the jury in the form of the transcript. Rule 106 did not, in our view, require admission of Crescenzi's June testimony, given some eight months later, in order to present the full context of his October appearance.

Moreover, as noted above, the pertinent portions of Crescenzi's June testimony *were* read into the record during cross examination, despite the fact that they were inadmissible hearsay. Thus, even if Rule 106 applied with respect to the June testimony, it was satisfied here. The district court went further with respect to the October testimony, by allowing the jury to receive a copy of the transcript, only because of petitioners' allegations of pervasive prosecutorial misconduct at Crescenzi's October appearance. Petitioners did not mount a comparable attack on the manner in which the June proceedings were conducted—and for good reason, because Crescenzi's testimony on those occasions, like his testimony at trial, tended to exculpate petitioners. Thus, as the district court held, there was no need for the jury to receive the actual transcripts of the June proceedings in order to determine whether Crescenzi had been the victim of prosecutorial misconduct.[13]

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[13]In the court of appeals, petitioners cited but one instance (Reply Br. 9-11) in which the attorney for the government supposedly cut Crescenzi off during questioning at an appearance in June (Tr. 2209-2210). But, on that occasion, the attorney for the government interrupted Crescenzi only to request him to listen to the question. The attorney for the government then told Crescenzi he could explain

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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his view, and, in fact, he fully did so with respect to payments made to petitioners (App. 4927a-4932a). Crescenzi testified at trial that he could not remember the incident or whether he was stopped in the course of the testimony (Tr. 2216-2218). In any event, Crescenzi was fully cross-examined as to whether he was cut off by the government attorney at this point (Tr. 2210, 2216, 2218). Petitioners can hardly assert that they were prejudiced because the jury did not have the entire transcript of the June proceedings so it could examine this one passage, which, at all events, was fully explored at trial. The other passage relied upon by petitioners in the court of appeals (Reply Br. 12-13; Tr. 1965-1966) quite clearly refers to Crescenzi's October, not his June, appearance.

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